In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1950

STAN A. WALLIS, PETITIONER

v.

COLONEL OLIVER E. O'KIER, COMMANDANT, UNITED STATES DISCIPLINARY BARRACKS, FORT LEAVENWORTH, KANSAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that his court-martial conviction was invalid because evidence was admitted at his trial that had been seized pursuant to a warrant issued by his Air Force Base Commander on the basis of an unsworn verbal briefing session, in violation of the "oath or affirmation" and "detached magistrate" requirements of the Fourth Amendment.

Following a general court-martial at Mountain Home Air Force Base, Idaho, petitioner, an Airman E-2 in the United States Air Force, was convicted of selling and possessing lysergic acid diethylamide (LSD), in violation of Article 92 of the Uniform Code of Military Justice ("U.C.M.J."; 10 U.S.C. 892), and possessing marijuana, in violation of Article 134, U.C.M.J. (10 U.S.C. 934). The court-martial sentenced petitioner to a term of four years' confinement at hard labor, and ordered that he be reduced to the grade of Airman Basic, forfeit all pay and allowances, and be dishonorably discharged from the Air Force.

Following a review of the case by the Judge Advocate General of the court-martial convening authority, pursuant to Article 61, U.C.M.J. (10 U.S.C. 861), the United States Air Force Court of Military Review affirmed the conviction (Pet. App. 12a-23a). The United States Court of Military Appeals denied a petition for review (Pet. App. 12a). Petitioner filed an application for a writ of habeas corpus on January 16, 1973, in the United States District Court for the District of Kansas. The writ was denied (Pet. App. 7a-11a)[1] and the court of appeals affirmed (Pet. App. 1a-6a).

The evidence adduced at petitioner's court-martial (see Pet. App. 16a-17a) showed that in early November 1970, one Airman Pfaff, assigned to the same installation as petitioner, told his first sergeant that he had used marijuana and knew others who were taking drugs. The sergeant told the base commander, who directed the base Office of Special Investigation ("OSI") to commence an investigation. On November 12, Pfaff was interviewed and indicated that he would cooperate with OSI. Four days later Pfaff turned over to OSI a pill that he said he had obtained from petitioner. Chemical analysis established that the pill contained LSD. Pfaff also had his first sergeant deliver to OSI a marijuana cigarette which Pfaff alleged he had received from petitioner's roommate. While in petitioner's room on November 16, Pfaff saw in petitioner's immediate possession a large number of pills, which petitioner identified as drugs. Petitioner offered to sell drugs to Pfaff, and Pfaff agreed to buy them. The transaction was to occur on November 23. A short time before the sale OSI again briefed the base commander.

---

[1]Petitioner completed his sentence and was released from confinement on April 13, 1973.

At trial the OSI agent who briefed the commander did not recall all the information he had recited to the commander. He was certain, however, that at least he had brought to the commander's attention that (1) Pfaff admitted using marijuana in the past; (2) Pfaff identified specific base personnel as the users and possible sellers of drugs; (3) Pfaff identified a pill, which laboratory analysis verified as LSD, as having been obtained from petitioner; (4) Pfaff stated that he had received a cigarette, chemically identified as marijuana, from petitioner's roommate; (5) Pfaff recited that he had seen a bottle of pills in petitioner's room and that petitioner indicated that the pills were illegal drugs and offered to sell them to Pfaff in a transaction that was to occur on November 23; and (6) Pfaff had undergone medical treatment for the use of drugs and was believed by his physician to be "sane, rational, and honest" (Pet. 16a-17a). Following the briefing, which lasted ten minutes, the commander authorized a search of petitioner and his room.

The OSI agents went to petitioner's barracks room. Upon a prearranged signal from Pfaff as he left the room, which indicated that a sale of drugs had just occurred, they entered the room with a pass key, and searched petitioner, two other occupants, and the room (Pet. 8). They seized, *inter alia*, various pills, a wool shirt with marijuana residue, and a coat with marijuana; the marijuana and pills were introduced into evidence at petitioner's court-martial *(ibid.)*.

Petitioner's contentions, that evidence seized under a military warrant must be excluded from a court-martial proceeding, if the warrant is not supported by an oath or affirmance and is issued by the base commander rather than a detached magistrate, is without merit. The court of appeals correctly held that under the power granted

to it in Article I, Section 8, of the Constitution, to make rules for the regulation of land and naval forces, Congress could properly delegate to the President the power to prescribe "by regulations which shall, so far as he considers practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter." 10 U.S.C. 836(a).

Thus, the court concluded, the President properly could provide, as he did in Section 152 of the Manual for Courts Martial, that the commanding officer of a military installation may issue a warrant for the search of a person or place under his command based on probable cause without requiring that the probable cause be supported by an oath or affirmation. In explaining the necessity for formulation of the warrant requirement in this manner, the court stated (Pet. App. 4a-5a):

> Although this was probably not such a case, many situations have existed and will exist in military commands where the formalizing of the probable cause by the affixing of a seal to a paper writing would be impracticable or impossible. Such a construction has been placed upon the provision by the military courts. The search made pursuant to a warrant issued, upon probable cause not supported by oath or affirmation, by the commanding officer of the military installation, where the search is to be made of property in the possession or under the control of a person in the command of the officer issuing the warrant, as in the case here present, is a valid search.

The court stated, moreover, that the mere fact that the commanding officer is responsible for the maintenance of order and discipline does not mean that he is partial, and that "[t]here is no reason to suppose that he would

be less willing than a magistrate that there be a fair and just administration of the law" (Pet. App. 5a).

The holding of the court of appeals below as well as other holdings of the Court of Military Appeals on this issue are sound. Although the Court of Military Appeals has stressed the value of a written application for authorization to search (*United States* v. *Hartsook*, 15 U.S.C.M.A. 291, 298), that court has expressly recognized that the absence of such a document does not invalidate the authorization. *United States* v. *McFarland*, 19 U.S.C.M.A. 356; *United States* v. *Penman*, 16 U.S.C.M.A. 67. Nor is there any requirement that the factual representations be made under oath or affirmation. *United States* v. *Penman, supra*, 16 U.S.C.M.A. at 74; *United States* v. *King*, 36 C.M.R. 929, 934 (Bd. Rev.), petition for review denied, 36 C.M.R. 541 (Ct. Mil. App.). Moreover, as one commentator has observed in demonstrating that the provisions of the Fourth Amendment relating to the issuance of general warrants do not apply to court-martial proceedings (Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 Harv. L. Rev. 266, 271-272 (1958); footnotes omitted):

> First, the development of the fourth amendment came rather late in our constitutional history. Not until 1886, in the *Boyd* case, was that amendment given content, and the concept of excluding evidence obtained through an illegal search and seizure was first formulated in the *Weeks* case, in 1914. There is nothing whatever in Winthrop on searches and seizures. Moreover, the *Weeks* principle does not appear in military law until the closing years of World War II; nor was it applied to searches within military installations even in qualified form until 1949.

> Second, the modern view that the fourth amendment is aimed essentially at protecting the right to privacy is, on its face, "not appropriate to military life." There is no privacy in military life, least of all for those in the ranks; their barracks, their few possessions, their very persons, are all subject to inspection by superiors as a matter of course without notice. And certainly the soldier of 1790's—unpaid, poorly clothed, subject to frequent and brutal punishment, continually (if improperly) made to be servant to his officers—had not even the tenuous and episodic privacy that his present-day successors have on occasion. The actualities of military life in the decade or so after the adoption of the Constitution utterly negative any notion that the first American soldiers were shielded against searches of any kind.

There is compelling need for commanding officers to have the general power to authorize searches and seizures in premises under their control upon probable cause but without an oath or affirmation or an application to a magistrate. The obligation, involved in this case, to protect against the sale and distribution of illicit hallucinatory drugs on an Air Force base amply illustrates that need.[2]

---

[2] The cases cited by petitioner to support the proposition that a military warrant requires an oath or affidavit are not in point, since they are civilian cases. For example, *Saylor* v. *United States*, 374 F. 2d 894 (Ct. Cl), involved a warrant for an unlimited search of the premises and automobile of a civilian employee of the armed forces without any showing of probable cause. The Court of Claims held that the incriminating papers seized pursuant to the search could not be introduced in a hearing before the grievance board, and could not be used by the government to defend against a claim for back pay by showing that the plaintiff's conduct justified his dismissal. The courts have held, however, that so long as searches of military personnel conform to military law, their fruits are admissible in non-military trials. *United States* v. *Grisby*, 335 F. 2d 652 (C.A. 4); *Richardson* v. *Zuppann* 81 F. Supp. 809, 813 (M.D. Pa.), affirmed, 174 F. 2d 829 (C.A. 3); see *United States* v. *Leon*, 441 F. 2d 175, 178 (C.A. 5). There is no reason for a different result here.

In sum, the court of appeals correctly applied settled principles and its decision does not conflict with any other decisions nor otherwise warrant review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

DOJ-1974-09